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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, ET AL., APPELLANTS

v.

ROBERT MARTIN, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE OF THE STATE OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court (A. 34–49) has not yet been reported.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on December 23, 1968.[1] Appellants' timely motion for a rehearing was

[1] A three-judge court was properly invoked, as required by 28 U.S.C. 2281, to consider appellants' not insubstantial constitutional contentions against the continued enforcement of the State statute. Appellants' constitutional claims were considered at length in the district court but we do not discuss them here.

denied on March 12, 1969. On May 8, 1969, appellants filed a notice of appeal to this Court, and on November 10, 1969, probable jurisdiction was noted. This Court's jurisdiction rests on 28 U.S.C. 1253.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act and implementing regulations, and the California Welfare and Institutions Code and implementing regulations, are set forth in the Appendix, *infra*, pp. 35–39.

QUESTIONS PRESENTED

The United States will discuss the following questions, which are fairly comprised within Question I of the Questions Presented in the appellants' Jurisdictional Statement:

1. Whether a "man assuming the role of spouse" ("MARS") or a stepfather who does not adopt his wife's children is a "parent" for purposes of the federal Aid to Families With Dependent Children program.

2. Whether the federal statute requiring that State welfare agencies shall "in determining need, take into consideration * * * income and resources" of any child for whom AFDC assistance is sought precludes a regulation of the Secretary of Health, Education, and Welfare excluding from such consideration any income of a person lacking a general parental obligation of support unless it "is actually available for current use on a regular basis."

We take no position with respect to the other questions discussed by the parties.

INTEREST OF THE UNITED STATES

The court below has invalidated as inconsistent with the Social Security Act a federal regulation that is of nationwide applicability and of central significance to the federal Aid to Families with Dependent Children program. This decision, if permitted to stand, will substantially frustrate the legislative purpose underlying this program.

STATEMENT

1. THE AFDC PROGRAM

This case involves the administration by the Secretary of Health, Education, and Welfare and the State of California of the Aid to Families with Dependent Children Program ("AFDC"), established by the Social Security Act, 42 U.S.C. 601–610. The Act defines a dependent child as an age eligible "needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" a specified relative. 42 U.S.C. 606(a). Federal matching funds are authorized to finance assistance to such dependent children; in fact, the federal government assumes the major portion of the program's cost.

Under the Act, a participating State[2] must submit

[2] Although participation in the program is voluntary, every State, and also the District of Columbia, Guam, Puerto Rico and the Virgin Islands, participate. See *King* v. *Smith*, 392 U.S. 309, where the nature and background of the AFDC program are described in some detail.

to the Secretary, and have approved by him, an AFDC plan which conforms with the statutory requirements and any rules and regulations promulgated thereunder by the Secretary. 42 U.S.C. 601-604. Moreover, the States are required by the Act to furnish assistance to all individuals eligible under their plans. 42 U.S.C. 602(a)(10). But the States do retain considerable latitude in allocating the resources furnished. Indeed, 42 U.S.C 602(a)(7) and (8), and implementing federal regulations, require the States to determine the needs of individuals seeking assistance, consistent with certain specified federal principles. And the State plans may provide for full or partial payment of the sums found to be needed.[3] See *Rosado* v. *Wyman*, No. 540, this Term.

The federal statute provides that the State agencies administering AFDC plans "shall, in determining need [of an eligible child], take into consideration any other income and resources [of the child] * * * as well as any expenses reasonably attributable to the earning of any such income." 42 U.S.C. 602(a)(7). Similar requirements apply to the other assistance programs

[3] Two types of reduced payments are commonly used: payments of a fixed percentage of the need; and payments to individuals or families according to need up to stated dollar maximums. California presently limits payments to stated dollar maximums. See California Welfare and Institutions Code, §§ 11450 *et seq.* A three-judge district court recently held that this statute, as administered, discriminates irrationally among AFDC recipients, and therefore violates the Equal Protection Clause of the Fourteenth Amendment. *Kaiser* v. *Montgomery*, Civ. No. 49,613 (N.D. Cal., Aug. 28, 1969), appeal pending, No. 828, this Term. See, also, *Dandridge* v. *Williams*, No. 131, this Term.

under the Social Security Act which are funded by the federal and State governments on a matching basis. See 42 U.S.C. 302(a)(10)(A) (old age assistance); 42 U.S.C. 1202(a)(8) (aid to the blind); 42 U.S.C. 1352(a)(8) (aid to the permanently and totally disabled); 42 U.S.C. 1382(a)(14) (aid to the aged, blind or disabled). These various statutory directives are implemented by a general regulation of the Secretary, which became effective on July 1, 1967, and which, as then worded, provided in part that:

> [O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.[4]

In *King* v. *Smith*, 392 U.S. 309, 319 n. 16, the Court stated that this limitation of the regulations as to what may be presumed to be resources of the child "clearly comport[s] with" the Social Security Act.

On August 8, 1968, the Secretary promulgated an additional regulation (45 C.F.R. 203.1), which elaborates this general prohibition against unwarranted pre-

[4] HEW Handbook of Public Assistance Administration, pt. IV, § 3131.7. Regulations promulgated by the Secretary, which originally appeared only in the HEW Handbook, are now being published in the Federal Register, and will appear in the Code of Federal Regulations. Section 3131.7 has now been published, in slightly altered form, in 34 Fed. Reg. 1394 (45 C.F.R. 233.20(a)(3)(ii)(*c*)), which provides:

> (ii) * * * in establishing financial eligibility and the amount of the assistance payment: * * * (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

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sumption of income with specific reference to the AFDC program. This supplementary regulation details how the general regulation referred to above applies to the statutory directive of 42 U.S.C. 602 (a)(7)—that, in determining a dependent child's need, the States must "take into consideration any other income and resources [of the child]"—in light of the eligibility limitation built into 42 U.S.C. 606 (a), which makes benefits available only to "a needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home, or * * * incapacity of a parent * * *".[8] The new regulation provides in pertinent part:

> (a) A State plan for aid and services to needy families with children * * * must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent * * * will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

[8] This new regulation came shortly after this Court's decision in *King* v. *Smith*, *supra*, which dealt with the scope of this threshold limitation of beneficiaries to children without "parents".

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. * * * [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.* [Emphasis added.]

Thus, the HEW regulations governing State AFDC plans provide that the eligibility of a child for assistance and the amount of assistance shall be determined without regard to the presence in the home of any person other than one having the same obligation of support as a natural or adoptive parent, except to the extent that a person without such an obligation is shown to be making actual contributions to the support of the child for current use on a regular basis. In other words, the regulations elaborate upon the federal statute by explicitly prohibiting any notion that a non-adopting stepfather[6] or what some States have characterized as a "man assuming the role of a spouse" ("MARS") not

[6] Throughout this brief, the word "stepfather" will, unless otherwise qualified, refer only to a man married to a child's mother who has not adopted the child.

married to the mother, may be presumed, in determining a child's needs, to be providing gratuitous support.[7]

2. THE CONFLICT BETWEEN THE FEDERAL REGULATIONS AND THE AFDC PLANS OF CALIFORNIA AND SEVERAL OTHER STATES

California has, by statute, taken a different and conflicting approach. Section 11351 of the California Welfare and Institutions Code provided (when these suits were brought) that AFDC assistance given to a child living with his mother and a stepfather or MARS "shall be computed after consideration is given to the income of the stepfather or such adult male person."[8] That Section provided additionally that "a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from [him] they would be needy children eligible for aid * * *."

In implementing regulations, the California Department of Welfare has defined a MARS as a man who, while not married to the mother and not the father of any of her children, "is in or around the home and is maintaining an intimate relationship with the mother"; and has either (1) "assumed sub-

[7] An exception is made for the situation, not directly involved in this case, where the welfare recipient elects to include such a person in the family budget unit as an "essential person". See pp. 31–33, *infra*.

[8] In computing the income of the stepfather or MARS that is available to a child, certain amounts for the man's living and other expenses are deducted. See California Department of Social Welfare, Public Social Services Manual (hereafter "California Manual"), Sections 44–133.53, 44–133.112, 44–113.2, 44–113.2(.242).

stantial financial responsibility for the ongoing expenses of the * * * family", or (2) "represented himself to the community in such a way as to appear in the relationship of husband or father, or both." California Manual, Section 42–515.4(.41).[9] The regulations specify that "[t]he amount the * * * man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the" family, and reduce AFDC payments accordingly. California Manual, Section 44–133.5(.51). A similar reduction is made on account of a stepfather's "available income" "when his wife and her children are living in the home with him * * *".[10] California Manual, Section 42–513.5(.54).[11] In both cases, the man's "available income" is added to the income of the family, thus reducing or eliminating its AFDC assistance, whether or not that amount—or any contribution—is in fact received by the family.

Practices similar to California's are found in other States.[12] For example, Hawaii,[13] Nebraska,[14] New

[9] This Section was numbered 42–535.1(.11–.13) when this action was instituted.

[10] He is also declared to be responsible for his wife and any of his children from another marriage, whether living inside or outside the home.

[11] This section was numbered 42–531.2 when this action was instituted.

[12] A compilation of the pertinent State provisions cited in this paragraph has been lodged with the Clerk of this Court and provided to counsel.

[13] Hawaii Department of Social Services Manual, Vol. I, Ch. 3, §§ 3384 and 3388.1. Following negotiations with HEW, however, the State has submitted revised plan material which, while still under review, appears likely to resolve the problem.

[14] Nebraska Department of Public Welfare, State Plan and Manual, IX–4341, 4342 par. 3, 4343 (presence in home of step-

Hampshire,[15] North Dakota,[16] Oregon,[17] and South Dakota[18] attribute income of the stepfather to the AFDC family. The income of an unrelated male living in the home, as well as that of a stepparent, is so attributed in Arizona,[19] New Jersey,[20] and New York,[21] while Washington[22] attributes the unrelated male's income. In Indiana,[23] Vermont[24] and Wisconsin,[25] the presence in the home of a stepfather makes the child

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father who is able but refuses to support makes child ineligible).

[15] New Hampshire Public Assistance Manual, Ch. III C, p. 95 (HEW informs us that the practice of the State is to assume that the stepparent's income is available, as suggested by the State's plan provisions requiring stepparents to assist or support). New Hampshire has enacted a new law which purportedly holds stepparents liable for the support of stepchildren and is of general applicability (Ch. 478 of the New Hampshire Laws of 1969, amending sections 546–A: 1, V and 167.2 of N.H.R.S.A.). An opinion of the New Hampshire Attorney General interpreting the 1969 law is under review by HEW.

[16] Public Welfare Board of North Dakota, Social Work Manual, Ch. 320, §§ 50–09–08.1 and 50–09–10.

[17] Oregon Public Welfare Department Staff Manual, Chapter II, § 2145.5.

[18] South Dakota Public Welfare Manual, Volume I, III–5A–24.

[19] Arizona, Aid for Dependent Children Manual, § 3–420.

[20] New Jersey Department of Institutions and Agencies, Division of Public Welfare Manual of Administration, Part III, § 2330. Following discussions with HEW, New Jersey has agreed to submit plan material shortly which will comply with applicable federal policy.

[21] New York Department of Social Welfare Regulations, § 353.3(a)(2).

[22] Washington Manual, Vol. II, § 8.54.

[23] Indiana Public Assistance Manual, § III–C–3.

[24] Vermont Family Services Policy Manual, Vol. II, Part III, § 2331.4.

[25] Wisconsin Laws of 1969, Chapter 154.

totally ineligible for assistance, and in Idaho[26] the presence in the home of a stepfather or "some other person acting as a parent" has that result. In Michigan[27] the plan provides that a child is ineligible if the parent is living with a non-spouse whom he or she does not take steps to marry, and in Connecticut[28] an otherwise eligible male and his children are ineligible for assistance when they share living arrangements with a female and her children.

3. THE PROCEEDINGS IN THIS CASE

The present class actions were instituted by recipients of AFDC assistance whose benefits had been reduced or terminated because of the presence in their homes of men characterized as MARS.[29] Plaintiff Genever Lewis alleged that she was the mother and guardian of two minor children; that prior to commencement of the action she had been receiving a monthly AFDC payment of $172.00; that the county welfare department was about to reduce the monthly payment to her family by $53.55; that this reduction was due to

[26] Idaho, Manual of Operating Policies and Procedures, Ch. 2, § 3240. Idaho is presently revising its plan material, and it is anticipated by HEW that the revised plan will comply with applicable federal policy.

[27] Michigan AFDC Plan, Item 259(2). HEW informs us, however, that this plan provision is not, in practice, implemented by the State.

[28] Connecticut State Welfare Department, Bulletin No. 2211, p. 3 (1968).

[29] *Lewis* v. *Stark* was instituted on October 31, 1968, and *Percy* v. *Montgomery* was instituted on November 12, 1968 (App. 1). The cases were consolidated for hearing before a three-judge district court on November 26, 1968 (A. 3).

the presence in her home of one Mr. Watson who was not married to Mrs. Lewis and had adopted none of her children; that the sum of $53.55 assumed to be available from Mr. Watson was not in fact available to her or her children; and that plaintiff had filed an administrative appeal, offering to prove that she was not in fact receiving funds from Mr. Watson, but that the county welfare department refused to consider such offer of proof (A. 7–9).

Plaintiff Margaret Percy alleged that she was the mother of one child; that she had been entitled to an AFDC payment in October 1968 of $148.00; that such payment was denied because of the presence in her home of one Melvin Jones, who was not married to her and had not adopted her child, and whose income was assumed to be, but was not in fact, available to Margaret Percy and her child; that Mr. Jones earned approximately $370 per month but had expenses of approximately $400 per month; and that the county welfare department had refused to consider evidence offered to prove that Mr. Jones was not assuming substantial financial responsibility for the family (A. 15–18).[30]

Subsequent to the filing of the above complaints, the district court granted motions to intervene made

[30] The complaint stated that, due to the emergency situation created by the welfare department's termination of benefits to the Percy family, Mr. Jones, disregarding his personal needs and the just demands of creditors, was providing some food and shelter, but that Mr. Jones could not continue to provide for the needs of the Percy family and would terminate all support as soon as the family was deemed eligible for AFDC assistance (A. 18).

on behalf of families with non-adopting stepfathers who similarly were not contributing to the children's support. Plaintiff intervenor Bertha Bell alleged that she was the mother and general guardian of five minor children; that in July 1967 she married one Maywood Bell, by whom she had a sixth child; that Mr. Bell has not adopted the other five children; that the county welfare department totally denied AFDC benefits to Mrs. Bell and her five children from April to September 1968, on the basis of income which was assumed to be, but was not in fact, available from Mr. Bell; that during this period Mr. Bell made certain emergency payments for food and shelter; that in October 1968 Mr. Bell, in order to prevent Mrs. Bell and her five children from being denied AFDC assistance, was compelled to separate from his wife and leave her residence; that this departure has deprived the Bell family of the only male figure in the household, and is causing the children severe psychological and emotional harm; and that Mrs. Bell requested and received an administrative hearing before a referee in May 1968 to contest the denial of payments to her family, but that no decision had been rendered by the time the motion to intervene was filed (A. 25–27).

The gravamen of the complaints was that the California statute and implementing regulations were invalid because they were (1) inconsistent with the Social Security Act and the Secretary's regulations thereunder; and (2) in violation of the equal protection and due process clauses of the United States Constitution, as well as an invasion of the appellants'

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right to privacy. The complaints sought injunctions prohibiting the appellee State and local officials from enforcing the challenged provisions of the State statute and implementing regulations. The plaintiffs also requested all other proper relief, which presumably would include the award of back payments.

On appellee's motion, the three-judge district court (convened pursuant to 28 U.S.C. 2281) dismissed the consolidated complaints for failure to state a claim upon which relief could be granted. The court held that the HEW regulation prohibiting presumption of income to the children in these cases (see *supra*, pp. 6–7) was inconsistent with 42 U.S.C. 602(a)(7) and therefore invalid. It also rejected appellants' constitutional claims and ruled that the California statute and regulations are consistent with the Social Security Act and valid.[31] Appellants filed their jurisdictional statement on July 7, 1969, and this Court noted probable jurisdiction on November 10, 1969[32] (396 U.S. 900).

4. SUBSEQUENT DEVELOPMENTS

On September 3, 1969, the governor of California signed into law a new Section 11351.5 of the California Welfare and Institutions Code, which became effective November 10, 1969. It leaves unchanged Section 11351 and implementing regulations insofar as they apply to a stepfather, but repeals the old Sec-

[31] The Secretary filed a post-judgment motion for leave to intervene as a party plaintiff, which was denied.

[32] The United States filed a brief *amicus curiae*, in support of appellants' jurisdictional statement, on July 31, 1969.

tion 11351 insofar as it applied to "an adult male person assuming the role of spouse". Under the new law, a MARS "shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement." The new law also provides that, under regulations to be promulgated by the State Welfare Department, the MARS and the mother will be required to present the department with "all of the facts in connection with the sharing of expenses * * *." According to the latest information available to HEW, the new law has not yet been applied to the State's administration of the AFDC program, and the date when this will occur is uncertain. HEW has not been apprised of the regulations which the State will promulgate to implement the new law.

ARGUMENT

INTRODUCTION AND SUMMARY

We believe that the regulations of the Secretary of Health, Education, and Welfare prohibiting reduction of AFDC assistance on account of the presence of a stepfather or MARS with no generally applicable parental obligation of support are fully consistent with the applicable section of the Social Security Act, 42 U.S.C. 602(a)(7). As the district court recognized, California's limitations upon federally assisted payments to children in homes where there is a step-

father or a MARS explicitly conflict with those regulations and must fail if they are valid. Accordingly, the decision below should be reversed, and it is unnecessary to reach the constitutional issues that the appellants also raise.[33]

Before reaching the specific question of the validity of the Secretary's regulations, however, it is appropriate to consider whether, in light of the obligations imposed on him by California law, a MARS or non-adopting stepfather is a "parent" within the meaning of 42 U.S.C. 606(a)(1). For if he is such a "parent", his presence in the home would mean that the child is not deprived of support "by reason of the death, continued absence from the home, or * * * incapacity

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[33] The recent amendment of the California law with respect to families having a MARS does not render the questions in this case moot. (See pp. 14–15, *supra*.) The law as to stepfathers is unchanged, and the claims for back payments in this case call into question the validity of the prior California law as to MARS.

Wrongfully withheld back payments are recoverable under State law. California Welfare and Institutions Code, Section 10961 provides that a decision by the Director of the County Welfare Department, made after a hearing, favorable to the applicant, requires the Director to

> pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto * * *.

See *Board of Social Welfare* v. *County of Los Angeles*, 27 Cal. 2d 81, 162 P. 2d 630.

Accordingly, the discussion in this brief will relate to the California statute as it read prior to the recent amendment.

of a parent" within the meaning of that statutory provision. And, as this Court said in *King* v. *Smith*, 392 U.S. 309, 313, "[u]nder this provision, * * * [AFDC] aid can be granted only if a 'parent' of the needy child is continually absent from the home." If the MARS or stepfather is a "parent", therefore, the federal statute itself would preclude any federal matching assistance under the AFDC program for children living with a MARS or stepfather," and the plaintiffs here would have no rights under the Act.

1. In urging that the MARS or stepfather should not be deemed a "parent" within the meaning of the federal Act, we note, first, that the obligation of support which California law purports to impose on a MARS or non-adopting stepfather arises if, and only if, a child of the woman with whom he is living would otherwise be entitled to AFDC assistance—and that the MARS or stepfather can extinguish any such obligation merely by leaving the woman's home. Both the Social Security Act itself and this Court's interpretation of it in *King* v. *Smith*, 392 U.S. 309, indicate, we submit, that such an "obligation" does not make a man a "parent" for AFDC purposes. Rather he would have to have a full parental obligation to

[31] This would be so unless there were factors not relevant here, such as disability or unemployment. See *King* v. *Smith*, *supra*, 392 U.S. at 313, n. 7. The resulting disqualification would, of course, go much further than the California law, which does not treat such children as ineligible for AFDC benefits, but merely reduces payments to them on the basis of presumed support by the MARS or stepfather. And California would then not be allowed federal matching funds for any payments that it made to such children.

support the child which would be of general applicability and which would continue to exist if he were to leave the home.

It is, accordingly, unnecessary for this Court to decide whether the limited obligation of support purportedly imposed on the MARS and the stepfather is an actual, enforceable obligation. In fact, however, California court decisions and administrative practice indicate that this purported obligation is not legally enforceable by or on behalf of the child; the result is that a child is denied AFDC benefits because of a purported right to support that is not really guaranteed him.

2. The Secretary's regulations prohibiting reduction of AFDC payments on the basis of income presumed to be, but not in fact, available to an AFDC family, implement, rather than conflict with, the statutory requirement to "take into consideration any other income and resources of any child or relative claiming" AFDC benefits. This Court has so held by its summary affirmance in *Shapiro* v. *Solman*, 396 U.S. 5, and so stated expressly in *King* v. *Smith*, *supra*, 392 U.S. at 319, n. 16.

I. A "MARS" OR NON-ADOPTING STEPFATHER IS NOT A "PARENT" WITHIN THE MEANING OF 42 U.S.C. 606 (a)(1)

1. The California AFDC statute provides that a MARS or stepfather is "bound to support * * * his wife's children if without support from such step-

father or adult male person they would be needy children eligible for" AFDC assistance. California Welfare and Institutions Code, Section 11351. If, however, the children are needy but otherwise ineligible for assistance,[35] or if the children are not needy within the meaning of the welfare laws but would, if they were the adopted children of a father of like economic status, be entitled to more actual support than is provided by the AFDC program, the MARS' or stepfather's obligation vanishes. Moreover, the MARS' obligation exists only so long as he "*is in or around the home* and is maintaining an intimate relationship with the mother", California Manual, 42-515.4(.411) (emphasis supplied); and the stepfather's obligation exists only "when his wife and her children *are living in the home with him* * * *", California Manual, 42-513.5(.54) (emphasis supplied).

It is this obligation—tailored specifically to the AFDC program, and avoidable merely by leaving the home—which California claims has the effect of making a MARS or stepfather a Section 406(a) "parent" under federal law (Motion to Affirm at 7-8). We submit, however, that such an obligation—even if it is assumed to be enforceable rather than illusory (see *infra*, pp. 23-27)—does not render the MARS or stepfather a "parent" within the meaning of the federal law.

King v. *Smith*, 392 U.S. 309, dealt with an Alabama regulation purporting to disqualify from AFDC ben-

[35] For example, a child may be ineligible by reason of age. See, also, pp. 31-33, *infra*.

efits any child of a woman who cohabits inside or outside her home with a single or married able-bodied man. The specific question before this Court was whether such a man, denominated by Alabama as a "substitute father", could be deemed a "parent" within the meaning of 42 U.S.C. 606(a)(1):

> The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child. The State correctly observes that the fact that the man in question does not actually support the child cannot be determinative, because a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance. On the question whether the man must be legally obligated to provide support before he can be regarded as the child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term "parent" an individual who owed to the child a state-imposed legal duty of support [392 U.S. at 329.]

Thus the issue here is whether California imposes upon a MARS or stepfather the type of "state-imposed legal duty of support" referred to in *King*.

In rejecting Alabama's contention that a "substitute father" was a "parent", this Court examined the legislative history of the Social Security Act, which it

found to manifest a congressional intent to meet, through the AFDC program, a "need unmet by programs providing employment for breadwinners". As the Court stated (392 U.S. at 328–329):

> * * * It was designed to protect what the House Report characterized as "[o]ne clearly distinguishable group of children." H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a "breadwinner," "wage earner," or "father," as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word "parent." 49 Stat. 629, as amended, 42 U.S.C. § 606(a). [Footnotes omitted.]

It was in the framework of this legislative purpose that the Court then held that the Alabama "substitute father" was not to be regarded as a "parent" for AFDC eligibility purposes. The Court observed (*id.* at 329):

> It is clear, as we have noted, that Congress expected "breadwinners" who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother

> would benefit the mother's children whom he was not obligated to support.

In short, in finding determinative the absence of any legal obligation upon the part of the "substitute father" to support the child, the Court in *King* emphasized that the key purpose of the AFDC program is to provide economic security for children which could not reasonably be expected to be provided by programs designed to secure employment for "family breadwinners."

In this context, the "state-imposed legal duty of support" referred to in *King* is, we believe, the support duty of general applicability owing to a child from his natural or adoptive parent, not the kind of very limited "duty" California has imposed upon a MARS and a non-adopting stepfather. That this is so is demonstrated by the additional support for its conclusion which the Court found in *King* by reference to other provisions of the Act. 392 U.S. at 330–332. The Court pointed out that the term "parent" is used elsewhere in the AFDC provisions in contexts emphasizing full parental support obligations and that the statutory scheme takes great pains to ensure that efforts will be made to enforce those obligations against "parents" who have left the home. The Court concluded (392 U.S. at 332):

> The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child. The underlying policy and consistency in statutory

> interpretation dictate that the "parent" referred to in these statutory provisions is the same parent as that in § 406(a). The provisions seek to secure parental support in lieu of AFDC support for dependent children. Such parental support can be secured only where the parent is under a state-imposed legal duty to support the child. * * * [Footnote omitted.]

The *King* opinion thus indicates that an individual cannot be considered a Section 406(a) "parent" unless he owes to the children of the family in which he is living the type of state-imposed duty of support required of an actual or adoptive parent, *viz.* a duty of general applicability which he could be compelled by court order to fulfill even after he has deserted or abandoned the household and regardless of whether the children would otherwise receive AFDC payments. The duty California imposes upon a MARS and a stepfather hardly qualifies as such.

Indeed, California appears to recognize that this is so. For, as previously noted, under the State statute and implementing regulations the presence of a MARS or a stepfather in a needy home does not strip the child of eligibility for AFDC benefits as a "dependent child", but merely has the possible effect of reducing the amount of those benefits (albeit to zero in some cases).

2. The foregoing argument assumes that there exists an actual and enforceable, if severely limited, obligation of support imposed by California on the MARS and the non-adopting stepfather. The relevant judicial and executive interpretations of the State

law indicate, however, that this assumption is not justified, because the purported "obligation" is not legally enforceable against either a MARS or a non-adopting stepfather.

In *People* v. *Rozell,* 212 Cal. App. 2d 875, 878, 28 Cal. Rptr. 478, 480–481, the court rejected a contention that Section 11351 (imposing the "obligation")

> is unconstitutional in that it takes property without notice and hearing and is a denial of due process of law in that it deprives [a MARS] of his property. * * * The statute does not deprive the adult male of his property. It merely states in the portion with which we are concerned that if an adult male assumes the role of a spouse his income shall be taken into consideration in determining the amount of the grant. The purpose of such regulation or enactment is to administer the program fairly and to safeguard public funds. It is a reasonable device to determine the needs of a child. It is based on the assumption that a man assuming the role of a spouse will contribute to the support of the mother and her children. *It takes nothing from him. It merely requires that his income be considered.* * * * [Emphasis supplied.]

To the same effect, see *County of Kern* v. *Coley,* 229 Cal. App. 2d 172, 40 Cal. Rptr. 53. Cf. *People* v. *Shirley,* 55 Cal. 2d 521, 11 Cal. Rptr. 537, 360 P. 2d 33. And in an opinion of the Attorney General of California, *People* v. *Shirley, supra* and *People* v. *Rozell, supra,* were cited as authority that a MARS is a man "* * * 'who has no legal obligation to sup-

port the child, and who may, in fact, legally refuse to do so.'" 44 Op. Atty. Gen. Calif. 155, 157, Opinion No. 64–63, quoting from *People* v. *Shirley,* 55 Cal. 2d at 527, 11 Cal. Rptr. at 540, 360 P. 2d at 36 (dissenting opinion).

Similarly, *People* v. *Owens,* 231 Cal. App. 2d 691, 42 Cal. Rptr. 153, held that the present Section 11351 does not require a non-adopting stepfather to support his wife's children, but instead serves only to reduce the amount of welfare benefits received by the needy family. The stepfather had contended that the county welfare department's budgeting formula, which considered his income in determining the amount of assistance to which the family was entitled, contravened the provision of Section 209 of the California Civil Code that a "husband is not bound to maintain his wife's children by a former husband * * *." In rejecting this contention, the court quoted with approval from *People* v. *Rozell, supra,* and then stated (231 Cal. App. 2d at 697, 42 Cal. Rptr. at 157) (emphasis supplied):

> In the present case, the budgeting formula which merely took [the stepfather's] income into consideration in determining the needs of his stepchildren *neither deprived him of said income nor required him,* contrary to Civil Code, section 209, *to support those children.*

The foregoing decisions reflect the apparent fact that there is no provision of California law which would permit either the mother, the children or the State to enforce civilly the purported obligation of the

MARS or non-adopting stepfather. Section 11351 provides no right of enforcement against either a stepfather or a MARS, and Section 209 of the California Civil Code expressly provides that a "husband is not bound to maintain his wife's children by a former husband * * *." By contrast, Section 196a of the California Civil Code provides that, with respect to illegitimate children, "[a] civil suit to enforce" parental "obligations may be maintained in behalf of a minor illegitimate child" by certain named persons. And with respect to legitimate children, Section 137.1 of the California Civil Code provides that a parent "may maintain an action" against the other parent "for the support, maintenance and education" of the child. There is, moreover, a statutory right of action by county supervisors against the estate of a deceased parent if the county is chargeable for the child's support. California Civil Code, Section 205.

This contrast between the statutory rights of enforcement against an actual parent, and the lack of such rights with respect to a non-adopting stepfather or MARS, suggests that the California legislature did not intend to make the purported obligation enforceable. At least, the administration of the law by California officials has been consistent with that view. For, in contrast to the number of reported decisions affirming the criminal convictions of recipients of welfare benefits,[36] we are unable to find any reported decision in which State welfare officials (or a mother

[36] See generally Note, *Defense in Welfare Fraud*, 5 San Diego L. Rev. 83 (1968).

or children) have instituted a civil action to enforce the MARS' or the non-adopting stepfather's purported "obligation". In other words, insofar as the matter can be determined from the State's judicial decisions, Section 11351 (which even theoretically promises the children nothing more than they would otherwise be entitled to under the AFDC program) has served only to lessen support for needy children by depriving them of AFDC payments on the unenforced assumption that the MARS or stepfather is meeting their needs.

3. The decision below, if permitted to stand, would thus point the way by which this Court's decision in *King* could readily be circumvented. By the simple expedient of declaring in a statute that a mother's paramour owed to her children a legal (though wholly unenforceable and illusory) obligation of support, Alabama (or any other State) could strip those children of eligibility for AFDC benefits, thus accomplishing precisely the result which this Court determined in *King* to be forbidden.

In sum, therefore, we submit that a MARS or a non-adopting stepfather in California is not a "parent" within the meaning of 42 U.S.C. 606(a), as interpreted by this Court in *King*, and his presence in the home is not in itself a justifiable basis for denial by the State of AFDC assistance to needy children.

II. THE SECRETARY'S REGULATIONS PROHIBITING A PRESUMPTION OF SUPPORT IN THESE CASES ARE VALID, AS THIS COURT HAS PREVIOUSLY HELD

We reach, then, the question whether the Social Security Act forbids the Secretary's regulations providing that only actual contributions by a nonparent may be taken into account in determining the need of a dependent child.

1. In contrast to the court below, we believe that this Court in *King* definitively resolved this question in favor of the regulations. Pointing to the fact that it was undisputed that "regular and actual" contributions to the child by the Alabama "substitute father" could be taken into account in determining whether the child was needy, the Court stated in a footnote (392 U.S. at 319, n. 16):

> Indeed, the Act requires that in determining need the state agency "shall * * * take into consideration any other income and resources of any child or relative claiming aid to families with dependent children * * *." 42 U.S.C. § 602(a)(7) (1964 ed., Supp. II). Regulations of HEW, *which clearly comport with the statute,* restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis * * *." This regulation *properly* excludes from consideration resources which are merely assumed to be available to the needy individual. Handbook, pt. IV, § 3131(7). See also §§ 3120, 3123, 3124, 3131(10), and 3131(11). [Emphasis supplied.]

As previously noted (*supra*, p. 5 & n. 4), the general regulation there adverted to by the Court is still in effect (with slightly altered wording). Its terms prohibit the State practices at issue here, even in the absence of the more detailed supplementary regulation (45 C.F.R. 203.1; see *supra*, pp. 6–7) specifically declared invalid by the court below. Moreover, application of the supplemental regulation to invalidate a Connecticut practice similar to California's was recently upheld summarily by this Court. *Shapiro* v. *Solman*, 396 U.S. 5 (in which the appellant urged the Court in its jurisdictional statement, p. 9, to invalidate 45 C.F.R. 203.1 "by following the same rationale" as the court below in the present cases).

This Court's statement in *King* and decision in *Shapiro* v. *Solman*, *supra*, accurately reflect the congressional intent. 42 U.S.C. 602(a)(7) was added to the Act, in essentially its present form, in 1939 (53 Stat. 1360). In commenting contemporaneously on the corresponding provision under the old-age assistance program, the congressional committee which considered this legislation stated:

> This will make it clear that, regardless of its nature or source, any income or resources will have to be considered, including ordinary income from business or private sources, Federal benefit insurance payments under title II of the Social Security Act, and any other assets or means of support. The committee recommends this change to provide greater assurance that the limited amounts available for old-age assistance in the States will be distributed only among those actually in need and on as equitable a basis as pos-

sible. [H. Rep. No. 278, 76th Cong., 1st Sess., p. 32; S. Rep. No. 734, 76th Cong., 1st Sess., p. 40.]

Thus, the manifest function of 42 U.S.C. 602(a)(7) is to insure that the limited supply of funds available for AFDC purposes will not go to persons not "actually in need." Its purpose is not to permit the deprivation of benefits to needy individuals on the basis of income and resources merely assumed to be available to them. By specifying in 45 C.F.R. 203.1 that the States are prohibited in the circumstances of the present cases from reducing AFDC assistance to the needy on the basis of income which is not actually available to them, the Secretary was validly exercising his delegated power to issue "rules and regulations * * * not inconsistent with" the Act. 42 U.S.C. 1302.

Indeed, the Secretary's regulation is not only not inconsistent with the Act, but is required by it. For 42 U.S.C. 602(a)(9) specifies that State plans provide that AFDC assistance "shall be furnished with reasonable promptness to all eligible individuals". An eligible needy child, who does not actually receive income and resources assumed to be available to him, remains needy. States which reduce benefits on the basis of presumed support from a non-parent are not furnishing AFDC assistance to "all eligible individuals". And the directive of 42 U.S.C. 602(a)(7) that "the State agency shall * * * take into consideration any other income and resources" of the needy child, on which the court below relied, implies, conversely,

that the State should not rely on what are in fact non-income and non-resources." Certainly, an unenforceable "obligation" of support created only for the purpose of minimizing AFDC payments (see pp. 23–27, *supra*) cannot fairly be considered even a potential source of income or resource of a needy child.

2. There is no support for the district court's further view (App. 41)—reasserted in this Court by the appellees (Motion to Affirm, pp. 8–9)—that the Secretary's regulation improperly intrudes upon the State's prerogative under the Act of determining the standard of need for eligible individuals. The Secretary's regulation infringes upon neither the State's determination of the standard of need, nor its discretion to pay all or a percentage of need thus determined. See *supra*, p. 4. The regulation simply directs that once a State determines the level of benefits to which needy individuals are entitled, it may not reduce that level by assuming income which is not actually available.

3. The appellees have further argued (Motion to Affirm, pp. 4–8) that the 1967 amendment to 42 U.S.C. 602(a)(7) codifying the Secretary's longstanding "essential person" policy somehow gives added justi-

" Moreover, when Congress amended 42 U.S.C. 602(a)(7) in 1967 (81 Stat. 821), after thorough study, it made the income and resources clause of that provision explicitly applicable to the "essential person", see pp. 31–33, *infra*, leaving it unchanged insofar as it applied to children and relatives claiming AFDC. This occurred after the Secretary had issued his general regulation prohibiting the presumption of income.

fication for a presumption of support by a MARS or stepfather. This policy permits a State to include in the family budget unit, for calculation of need, any additional person (other than the dependent children and the relative with whom they live) whose presence is deemed essential to the well-being of the recipients of assistance.[35] Thus, for example, an AFDC mother with several children may be permitted—if but only if she so desires—to include in the family budget unit a child too old to receive benefits whose continued presence in the home is essential to the well-being of the eligible younger children. A condition of the inclusion of the needs of such an "essential person" is the in-

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[35] The language added to 42 U.S.C. 602(a)(7) is italicized below:

"A State plan * * * must * * * (7) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid*, as well as any expenses reasonably attributable to the earning of any such income; * * *."

The Committee on Ways and Means, where this amendment originated, reported that the amended provision "makes no change in present law." H. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967). See, also, *Solman* v. *Shapiro*, 300 F. Supp. 409, 414–415 (D. Conn.), affirmed, 396 U.S. 5.

HEW's "essential person" policy was established by regulation in HEW Handbook of Public Assistance Administration, pt. IV, § 3131(4), which has now been published at 34 Fed. Reg. 1394 (45 C.F.R. 233.20(a)(2)(vi)). The policy is explained in detail in a letter dated December 13, 1968, to Mr. Thomas K. Gilhool from Alanson W. Willcox, then HEW General Counsel, reproduced at A. 52–59.

clusion also of his income. But this condition is no justification for the wholly different proposition—asserted by the appellees—that the income of a MARS or stepfather must also be included. None of the appellants has sought to have such a man included in the family budget unit, and indeed they could not under the applicable California regulations.[39] Thus, there is nothing in the Social Security Act indicating that the Secretary's regulations are invalid and must yield to conflicting State practices.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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[39] California Manual Section 42-535.2(.22) excludes any MARS from the family budget unit. Under Section 44-213.1 (.11(.111)) the stepfather is included in the family budget unit when he is needy, *i.e.*, when the amount of assistance to which he is entitled is greater than the amount of income he is assumed to have contributed to the family. When, however, the stepfather is not needy, Section 44-213.2(.31) excludes him from the family budget unit.

APPENDIX

Statutory and Regulatory Provisions Involved

42 U.S.C 602(a)(7) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must * * * (7) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income[.]

42 U.S.C. 602(a)(10) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must * * * (10) provide * * * that * * * aid to families with dependent children * * * shall be furnished with reasonable promptness to all eligible individuals[.]

42 U.S.C. 606(a) provides in pertinent part:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, * * *.

California Welfare and Institutions Code, Section 11351 provided (until November 1969):

> COMPUTATION OF AID; STEPFATHER'S INCOME; SUPPORT BY STEPFATHER.
>
> Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.
>
> Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.
>
> A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their step father by this section.
>
> As used in this section, "adult male person" means any male person of age 18 years or older.

California Welfare and Institutions Code, Section 11351.5 (enacted in September 1969) provides:

CONTRIBUTION OF UNRELATED ADULT MALE RESIDING WITH FAMILY APPLYING FOR OR RECEIVING AID.

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes into account such adult male person's income and expenses. The regulations formulated by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person willfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all of the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer, or boarder living in the home of a family applying for or receiving aid under this chapter.

45 C.F.R. 203.1 (33 Fed. Reg. 11290) provides in pertinent part:

> (a) A State plan for aid and services to needy families with children * * * must provide that the determination whether a child has been deprived of parental support or care by reason

> of the death, continued absence from the home, or physical or mental incapacity of a parent * * * will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.
>
> (b) The inclusion in the family, or the presence in the home of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. * * * [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

45 C.F.R. 233.20(a)(3) (34 Fed. Reg. 1394, *et seq.*) provides in pertinent part:

> (a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below: * * *
>
> (3) * * *
>
> (ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: * * * (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; * * *.

* * * * *

(vi) * * * In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

California State Department of Social Welfare, Public Social Services Manual, provides in pertinent part:

42–515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

* * * * *

.4 *Man Assuming the Role of Spouse*

.41 *Definition.*—A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

* * * * *

44–133.5 TREATMENT OF INCOME OF MAN ASSUMING THE ROLE OF SPOUSE

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

* * * * *

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